

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JOSEPH L. MIZZONI,

Plaintiff,

v.

STATE OF NEVADA, et al.,

Defendants.

Case No. 3:15-cv-00499-MMD-WGC

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections ("NDOC"), has submitted an amended civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*. (ECF No. 7, 1.) The matter of the filing fee shall be temporarily deferred. The Court now screens Plaintiff's amended civil rights complaint pursuant to 28 U.S.C. § 1915A.

**I. SCREENING STANDARD**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United

1 States, and (2) that the alleged violation was committed by a person acting under color  
2 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison  
4 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the  
5 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a  
6 claim on which relief may be granted, or seeks monetary relief against a defendant who  
7 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure  
8 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil  
9 Procedure 12(b)(6), and the court applies the same standard under § 1915 when  
10 reviewing the adequacy of a complaint or an amended complaint. When a court  
11 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the  
12 complaint with directions as to curing its deficiencies, unless it is clear from the face of  
13 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*  
14 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See  
16 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for  
17 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of  
18 facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*,  
19 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true  
20 all allegations of material fact stated in the complaint, and the court construes them in  
21 the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957  
22 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards  
23 than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).  
24 While the standard under Rule 12(b)(6) does not require detailed factual allegations, a  
25 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*  
26 *Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of  
27 action is insufficient. *Id.*

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1        Additionally, a reviewing court should “begin by identifying pleadings [allegations]  
 2        that, because they are no more than mere conclusions, are not entitled to the  
 3        assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal  
 4        conclusions can provide the framework of a complaint, they must be supported with  
 5        factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should  
 6        assume their veracity and then determine whether they plausibly give rise to an  
 7        entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for  
 8        relief . . . [is] a context-specific task that requires the reviewing court to draw on its  
 9        judicial experience and common sense.” *Id.*

10        Finally, all or part of a complaint filed by a prisoner may therefore be dismissed  
 11        *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This  
 12        includes claims based on legal conclusions that are untenable (e.g., claims against  
 13        defendants who are immune from suit or claims of infringement of a legal interest which  
 14        clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
 15        fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28  
 16        (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 17        **II. SCREENING OF AMENDED COMPLAINT**

18        Plaintiff sues multiple defendants for events that occurred while he was  
 19        incarcerated at Northern Nevada Correctional Center (“NNCC”). (ECF No. 7 at 1.)  
 20        Plaintiff sues Christopher Smith, Brannon, Lisa Walsh, Baca, McDaniel, and Cox. (*Id.* at  
 21        2-3). He alleges one count and seeks monetary damages and injunctive relief. (*Id.* 13-  
 22        11, 14.)

23        Plaintiff alleges the following in his amended complaint: On March 28, 2015, he  
 24        was involved in an incident<sup>1</sup> with correctional officer (“c/o”) C. Smith that resulted in

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25  
 26        <sup>1</sup> The incident with c/o Smith occurred after Plaintiff’s cell was allegedly “tore up”  
 27        and Plaintiff subsequently told Smith that he quit his porter job. At that point, an  
 28        altercation between Plaintiff and officer Smith occurred. These allegations are the  
 subject of another lawsuit filed by Plaintiff: *Mizzoni v. State of Nevada*, 3:15-cv-00313-  
 MMD-VPC.

1 disciplinary charges. (*Id.* at 3-4.) C. Smith wrote a false disciplinary report stating that  
2 Plaintiff hit him in the temple. (*Id.* at 7.) The disciplinary hearing for these charges took  
3 place on May 1, 2015. (*Id.* at 3.) Lt. Brannon was the hearing officer who presided over  
4 the hearing and fellow inmate Christopher Deyerle appeared as Plaintiff's witness. (*Id.*)  
5 Plaintiff pleaded not guilty and stated he did not hit c/o Smith on March 28, 2015. (*Id.* at  
6 3-4.) Plaintiff requested all witnesses and video to the incident which Brannon denied  
7 except Plaintiff's cellmate at the time of the incident, Deyerle. (*Id.*) Brannon told Plaintiff  
8 there was no video of the incident and that any video was for official use only. (*Id.*)  
9 Brannon denied all other witnesses that Plaintiff wished to call. (*Id.*) Plaintiff alleges  
10 there were inmates all around at the time of the incident and that there is a video  
11 camera in the unit that would have captured the incident, as well as a hand held video  
12 used by Sergeant Roberson. (*Id.*) Inmate Deyerle testified: "Four cops came in our  
13 house cell 5-B-29 and tore it apart. I knew [Plaintiff] was going to tell the cop that the  
14 house needs to be put together. When I came out [Plaintiff] was on the wall. C/O Smith  
15 went to grab his arm and [Plaintiff] said what are you doing. C/O Smith took him to the  
16 ground and said stop resisting. He then yelled for everyone to lock down. At this time  
17 other officers arrived and yelled lock down and I locked down." (*Id.* at 4.) Deyerle  
18 stated that were other witnesses in the rotunda who saw the same incident. (*Id.*) Prior  
19 to the disciplinary hearing, Plaintiff wrote to Warden Walsh and asked for all inmate and  
20 video evidence. (*Id.* at 4.) Brannon found Plaintiff guilty of battery and dropped the other  
21 two charges, assault and abusive language. (*Id.*) Brannon stated he was punishing  
22 Plaintiff for prior incidents as far back as eight years ago which Plaintiff has already  
23 been punished for. (*Id.*) Brannon sentenced Plaintiff to two years of disciplinary  
24 segregation. (*Id.* at 5.) Warden Walsh, Warden Baca, Assistant Director McDaniel, and  
25 Director Cox "all know Plaintiff didn't hit C. Smith and all conspired and retaliated  
26 against Plaintiff for this and prior grievances and lawsuits to obstruct justice . . ." (*Id.*)  
27 Plaintiff alleges his Fourteenth Amendment right to due process has been violated. (*Id.*  
28 at 7.)

1           **A.       Fourteenth Amendment - Due Process**

2           In order to state a cause of action for deprivation of procedural due process, a  
3       plaintiff must first establish the existence of a liberty interest for which the protection is  
4       sought. *Sandin v. Conner*, 515 U.S. 472, 487 (1995). In *Sandin*, the Supreme Court  
5       held that a prisoner has a liberty interest when confinement “imposes [an] atypical and  
6       significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.*  
7       at 484. In *Sandin*, the Supreme Court focused on three factors in determining that the  
8       plaintiff possessed no liberty interest in avoiding disciplinary segregation: (1) disciplinary  
9       segregation was essentially the same as discretionary forms of segregation; (2) a  
10      comparison between the plaintiff’s confinement and conditions in the general population  
11      showed that the plaintiff suffered no “major disruption in his environment;” and (3) the  
12      length of the plaintiff’s sentence was not affected. *Id.* at 486-87.

13           When a protected liberty interest exists and a prisoner faces disciplinary charges,  
14      prison officials must provide the prisoner with (1) a written statement at least twenty-four  
15      hours before the disciplinary hearing that includes the charges, a description of the  
16      evidence against the prisoner, and an explanation for the disciplinary action taken; (2)  
17      an opportunity to present documentary evidence and call witnesses, unless calling  
18      witnesses would interfere with institutional security; and (3) legal assistance where the  
19      charges are complex or the inmate is illiterate. *See Wolff v. McDonnell*, 418 U.S. 539,  
20      563-70 (1974).

21           “When prison officials limit an inmate’s efforts to defend himself, they must have  
22      a legitimate penological reason.” *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992).  
23      An inmate’s right to present witnesses may legitimately be limited by “the penological  
24      need to provide swift discipline in individual cases . . . [or] by the very real dangers in  
25      prison life which may result from violence or intimidation directed at either other inmates  
26      or staff.” *Ponte v. Real*, 471 U.S. 491, 495 (1985). Jail officials “must make the decision  
27      whether to allow witnesses on a case-by-case basis, examining the potential hazards  
28      that may result from calling a particular person.” *Serrano v. Francis*, 345 F.3d 1071,

1 1079 (9th Cir. 2003). Despite this, an inmate has no right to cross-examine or confront  
2 witnesses in prison disciplinary hearings. See *Wolff*, 418 U.S. at 567-68.

3 “[T]he requirements of due process are satisfied if some evidence supports the  
4 decision by the prison disciplinary board.” *Superintendent, Massachusetts Corr. Inst.,*  
5 *Walpole v. Hill*, 472 U.S. 445, 455 (1985). However, this standard does not apply when  
6 a prisoner alleges that a prison guard’s report is false. *Hines v. Gomez*, 108 F.3d 265,  
7 268 (9th Cir. 1997).

8 The Court finds that Plaintiff has stated colorable due process claims against  
9 Defendants Brannon and Smith. As the Court recognized in its first screening order  
10 (ECF No. 4), Plaintiff has stated a colorable claim against Defendant Brannon. Plaintiff  
11 alleges he was denied evidence and witnesses during his disciplinary hearing held on  
12 May 1, 2015, which was overseen by hearing officer Brannon and that Brannon  
13 punished him for prior acts that he had already been punished for. Plaintiff alleges that  
14 he made multiple requests for evidence and witnesses that were denied by Brannon,  
15 and that he was punished for conduct beyond the actual charges. The Court also finds  
16 that Plaintiff states a colorable claim against Defendant Smith. Plaintiff alleges that  
17 Smith made a false disciplinary report. An inmate can state a cognizable claim arising  
18 from a false disciplinary report if the false report was done in retaliation for the exercise  
19 of his constitutional rights or if the inmate was not afforded procedural due process in  
20 connection with the resulting disciplinary proceedings as provided in *Wolff v. McDonnell*,  
21 418 U.S. 539, 563–70 (1974). See *Moore v. Gipson*, Case No. 1:13-cv-01820-BAM,  
22 2014 WL 6893885, \*10 (E.D. Cal. Dec. 8, 2014.) Plaintiff alleges that Smith wrote a  
23 false report that resulted in a disciplinary hearing in which he did not receive due  
24 process. Plaintiff may proceed on his Fourteenth Amendment due process claim against  
25 Defendants Brannon and Smith.

## 26 **B. Supervisory Defendants**

27 A defendant is liable under 42 U.S.C. § 1983 “only upon a showing of personal  
28 participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A

1 supervisor is only liable for constitutional violations of his subordinates if the supervisor  
2 participated in or directed the violations, or knew of the violations and failed to act to  
3 prevent them. There is no respondeat superior liability under [§]1983.” *Id.*; see also  
4 *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that “[b]ecause vicarious liability is  
5 inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-  
6 official defendant, through the official’s own individual actions, has violated the  
7 Constitution”).

8 “A showing that a supervisor acted, or failed to act, in a manner that was  
9 deliberately indifferent to an inmate’s Eighth Amendment rights is sufficient to  
10 demonstrate the involvement—and the liability—of that supervisor.” *Starr v. Baca*, 652  
11 F.3d 1202, 1206-07 (9th Cir. 2011). “Thus, when a supervisor is found liable based on  
12 deliberate indifference, the supervisor is being held liable for his or her own culpable  
13 action or inaction, not held vicariously liable for the culpable action or inaction of his or  
14 her subordinates.” *Id.* at 1207. As such, “a plaintiff may state a claim against a  
15 supervisor for deliberate indifference based upon the supervisor’s knowledge of and  
16 acquiescence in unconstitutional conduct by his or her subordinates.” *Id.*

17 The Court finds that Plaintiff has not stated a colorable claim against Defendants  
18 Baca, Walsh, McDaniel, and Cox. Plaintiff has not alleged how these defendants were  
19 personally involved with the alleged constitutional violations beyond vague and  
20 conclusory allegations such as they “conspired” with Smith to file a false report. Such  
21 allegations are insufficient. See *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d  
22 266, 268 (9th Cir. 1982). Plaintiff fails to state a colorable due process claim against  
23 Defendants Baca, Walsh, McDaniel, and Cox and they are dismissed.

### 24 **III. CONCLUSION**

25 It is therefore ordered that a decision on the application to proceed *in forma*  
26 *pauperis* (ECF No. 1) is deferred at this time.

27 It is further ordered that Plaintiff’s Fourteenth Amendment due process claim will  
28 proceed against Defendants Smith and Brannon.



1 It is further ordered that Defendants Walsh, Baca, McDaniel, and Cox are  
2 dismissed.

3 It is further ordered that given the nature of the claim(s) that the Court has  
4 permitted to proceed, this action is stayed for ninety (90) days to allow Plaintiff and  
5 Defendant(s) an opportunity to settle their dispute before the \$350.00 filing fee is paid,  
6 an answer is filed, or the discovery process begins. During this ninety-day stay period,  
7 no other pleadings or papers will be filed in this case, and the parties will not engage in  
8 any discovery. The Court will refer this case to the Court's Inmate Early Mediation  
9 Program, and the Court will enter a subsequent order. Regardless, on or before ninety  
10 (90) days from the date this order is entered, the Office of the Attorney General must file  
11 the report form attached to this order regarding the results of the 90-day stay, even if a  
12 stipulation for dismissal is entered prior to the end of the 90-day stay. If the parties  
13 proceed with this action, the Court will then issue an order setting a date for Defendants  
14 to file an answer or other response. Following the filing of an answer, the Court will  
15 issue a scheduling order setting discovery and dispositive motion deadlines.

16 It is further ordered that "settlement" may or may not include payment of money  
17 damages. It also may or may not include an agreement to resolve Plaintiff's issues  
18 differently. A compromise agreement is one in which neither party is completely  
19 satisfied with the result, but both have given something up and both have obtained  
20 something in return.

21 It is further ordered that if the case does not settle, Plaintiff will be required to pay  
22 the full \$350.00 filing fee. This fee cannot be waived. If Plaintiff is allowed to proceed *in*  
23 *forma pauperis*, the fee will be paid in installments from his prison trust account. 28  
24 U.S.C. § 1915(b). If Plaintiff is not allowed to proceed *in forma pauperis*, the \$350.00  
25 will be due immediately.

26 It is further ordered that if any party seeks to have this case excluded from the  
27 inmate mediation program, that party must file a "motion to exclude case from  
28 mediation" on or before twenty-one (21) days from the date of this order. The



1 responding party will have seven (7) days to file a response. No reply will be filed.  
2 Thereafter, the Court will issue an order, set the matter for hearing, or both.

3 It is further ordered that the Clerk of the Court will electronically serve a copy of  
4 this order and a copy of Plaintiff's amended complaint (ECF No. 7) on the Office of the  
5 Attorney General of the State of Nevada, attention Kat Howe.

6 It is further ordered that the Attorney General's Office must advise the Court  
7 within twenty-one (21) days of the date of the entry of this order whether it will enter a  
8 limited notice of appearance on behalf of Defendants for the purpose of settlement. No  
9 defenses or objections, including lack of service, will be waived as a result of the filing of  
10 the limited notice of appearance.

11 DATED THIS 2<sup>nd</sup> day of September 2016.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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<p>,</p> <p style="text-align: center;">v.</p> <p>,</p>	<p>Case No.</p> <p>REPORT OF ATTORNEY GENERAL RE RESULTS OF THE 90-DAY STAY</p>
<p>Plaintiff,</p> <p>Defendants.</p>	

**NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL SHALL FILE THIS FORM. THE INMATE PLAINTIFF SHALL NOT FILE THIS FORM.**

On \_\_\_\_\_ *[the date of the issuance of the screening order]*, the Court issued its screening order stating that it had conducted its screening pursuant to 28 U.S.C. § 1915A, and that certain specified claims in this case would proceed. The Court ordered the Office of the Attorney General of the State of Nevada to file a report ninety (90) days after the date of the entry of the Court's screening order to indicate the status of the case at the end of the 90-day stay. By filing this form, the Office of the Attorney General hereby complies.

**REPORT FORM**

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

**Situation One: Mediated Case:** The case was assigned to mediation by a court-appointed mediator during the 90-day stay. [If this statement is accurate, check **ONE** of the six statements below and fill in any additional information as required, then proceed to the signature block.]

1        \_\_\_\_\_ A mediation session with a court-appointed mediator was held on  
2        \_\_\_\_\_ [enter date], and as of this date, the parties have  
3        reached a settlement, even if paperwork to memorialize the settlement  
4        remains to be completed. (If this box is checked, the parties are on notice  
5        that they must SEPARATELY file either a contemporaneous stipulation of  
6        dismissal or a motion requesting that the Court continue the stay in the  
7        case until a specified date upon which they will file a stipulation of  
8        dismissal.)

9        \_\_\_\_\_ A mediation session with a court-appointed mediator was held on  
10        \_\_\_\_\_ [enter date], and as of this date, the parties have not  
11        reached a settlement. The Office of the Attorney General therefore  
12        informs the Court of its intent to proceed with this action.

13        \_\_\_\_\_ No mediation session with a court-appointed mediator was held during the  
14        90-day stay, but the parties have nevertheless settled the case. (If this  
15        box is checked, the parties are on notice that they must SEPARATELY file  
16        a contemporaneous stipulation of dismissal or a motion requesting that the  
17        Court continue the stay in this case until a specified date upon which they  
18        will file a stipulation of dismissal.)

19        \_\_\_\_\_ No mediation session with a court-appointed mediator was held during the  
20        90-day stay, but one is currently scheduled for \_\_\_\_\_ [enter  
21        date].

22        \_\_\_\_\_ No mediation session with a court-appointed mediator was held during the  
23        90-day stay, and as of this date, no date certain has been scheduled for  
24        such a session.

25        \_\_\_\_\_ None of the above five statements describes the status of this case.  
26        Contemporaneously with the filing of this report, the Office of the Attorney  
27        General of the State of Nevada is filing a separate document detailing the  
28        status of this case.

\* \* \* \* \*

**Situation Two: Informal Settlement Discussions Case:** The case was NOT  
assigned to mediation with a court-appointed mediator during the 90-day stay;  
rather, the parties were encouraged to engage in informal settlement  
negotiations. [If this statement is accurate, check **ONE** of the four statements below  
and fill in any additional information as required, then proceed to the signature block.]

\_\_\_\_\_ The parties engaged in settlement discussions and as of this date, the  
parties have reached a settlement, even if the paperwork to memorialize  
the settlement remains to be completed. (If this box is checked, the  
parties are on notice that they must SEPARATELY file either a  
contemporaneous stipulation of dismissal or a motion requesting that the  
Court continue the stay in this case until a specified date upon which they  
will file a stipulation of dismissal.)

\_\_\_\_\_ The parties engaged in settlement discussions and as of this date, the  
parties have not reached a settlement. The Office of the Attorney General  
therefore informs the Court of its intent to proceed with this action.

\_\_\_\_\_ The parties have not engaged in settlement discussions and as of this  
date, the parties have not reached a settlement. The Office of the

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Attorney General therefore informs the Court of its intent to proceed with this action.

\_\_\_\_\_ None of the above three statements fully describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

Submitted this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by:

Attorney Name: \_\_\_\_\_  
Print Signature

Address: \_\_\_\_\_ Phone: \_\_\_\_\_  
\_\_\_\_\_ Email: \_\_\_\_\_